IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-408

INGALLS SHIPBUILDING CORPORATION, DIVISION OF LITTON SYSTEMS, INC.,
Petitioner,

versus

DOROTHY T. MORGAN, ERNEST T. MORGAN, JR., TIMOTHY E. MORGAN,
Claimants-Respondents,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 20, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 551 F.2d 61. The opinion of the Benefits Review Board (BRB) is reported at 3 BRB 310. The opinion of the Administrative Law Judge (ALJ) is reported as Case No. 75-LHCA-129. The opinion of the United States Court of Appeals for the Fifth Circuit is annexed as Appendix "A"; the opinion of the Benefits Review Board is annexed as Appendix "B"; the opinion of the Administrative Law Judge is annexed as Appendix "C".

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on the 20th day of April, 1977. (Appendix D) Rehearing was not sought in that court. An order was signed by Justice Powell extending to September 17th, 1977 the time for Petitioner to file a Petition for Writ of Certiorari. The jurisdiction of this court is invoked under 28 USC, Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal constitutional question involved is Article III, Section II, Paragraph 1 "the Judicial Power shall extend to . . . all cases of admiralty and maritime jurisdiction . . ." The federal statute involved is the Longshoremen and Harbor Workers' Compensation Act, 33 USC 901 et seq., the pertinent portion of which is appended hereto as Appendix "E".

QUESTIONS PRESENTED FOR REVIEW

Morgan was killed while moving a plate of steel in the fabrication shop located in Petitioner's shipyard at Pascagoula, Mississippi. His employment was non-maritime, in that he never went aboard a vessel on or near the navigable waters of the United States, and was totally a shore-based welder who would not otherwise be covered by the Act for part of his activity.

While much of what was said by this court in *Caputo* and *Blundo*[1] (hereinafter *Caputo*) is applicable to the shipbuilding industry, certiorari should be granted in this case to permit Petitioner to demonstrate on the merits that:

I. Congress did not extend the LHWCA to employees of a shipbuilder who were shore-based, non-maritime and would not otherwise be covered by the Act for part of their activities.

II. The "ongoing shipbuilding" test adopted by the Fifth Circuit Court of Appeals in *Halter Marine*[2] as applied to this case ignores the ". . . clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee . . ."[3] which is apparent from the congressional hearings. There is a conflict in the case sub judice, with settled principles of admiralty

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1 *Northeast Marine Terminal v. Ralph Caputo, ITO v. Blundo*, 45 LW 4729, 97 S.Ct. 2348, 53 L.ed.2d ____.
2 *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th, 1976)
3 *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th, 1975)

and maritime law adopted by this court and the decision of the United States Court of Appeals for the Ninth Circuit in *Weyerhauser*.

III. If the Fifth Circuit Court of Appeals has correctly divined[4] the intent of Congress to include land-based, non-maritime employees of a shipyard who would not otherwise be covered by the Act for part of their activity, then Congress exceeded its authority under Article III, Section II, P.1 of the Constitution.

STATEMENT OF THE CASE

While acting within the scope of his employment, Morgan was fatally injured at a shipyard in Pascagoula, Mississippi, which was owned and operated by Petitioner. A claim was filed with the U.S. Department of Labor, Bureau of Employee's Compensation, by Morgan's widow and dependents for death benefits under the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C.A., Section 901 et seq. (LHWCA). The claim was controverted by Petitioner on the basis that Morgan was covered by the Mississippi Workmens' Compensation Act rather than the LHWCA. The case was submitted entirely on an agreed stipulation and attached exhibits.

According to the stipulation and exhibits Morgan, on February 26, 1973, was hired by Ingalls as a shipfitter-helper-apprentice (AP 225). On February 27, 1973 Morgan was assigned to the training department

4 The total absence of any discussion in the congressional hearings concerning the shipbuilding industry leads to the conclusion that the Fifth Circuit perceived the impact of the amendments on shipbuilding by intuition, insight, or divination.

where he was given basic training which consisted of tack welding, hand torch burning, platen training, blueprint reading, basic mathematics, triangulation and layout, and welding familiarization. He was also given an academic course in shipbuilding terminology and a package of training rules and regulations (AP 225). On March 12, 1973 Morgan was assigned to the fabrication shop as a shipfitter-helper-apprentice. Morgan's duties at the fabrication shop were to work under Supervisors Smith and Havard to layout, cut, shape and tack steel parts which were made in the fabrication shop (AP 225).

As a shipfitter-helper-apprentice, Morgan was to learn the use of the various machinery located inside the fabrication shop and to cut, shape, and tack steel parts (AP 225). After the training program Morgan was assigned to Department 6, the unit administering shipfitters assigned to the fabrication shop. Department 6 consists solely of shipfitters and other crafts assigned to the fabrication shop and whose normal duties are confined to such shop (AP 226). Neither Supervisor had the authority to assign Morgan to a job near or over water. Morgan's duties were confined to the interior of the fabrication shop and there is no record in Morgan's file that he was ever assigned outside the fabrication shop (AP 225).

In March 1973 there were two departments at Ingalls for the shipfitter classification. Shipfitters who work in the fabrication shop were assigned to Department 6. Shipfitters who worked on launched ships or in the modular assembly area were assigned to Department 7 (AP 226). No change in Morgan's duties or department could be made without the transfer of the Ingalls shipyard. The transfer could only be made upon re-

quest of the employee and upon approval by Anderson, General Superintendent of Fabrication, the Director of the department involved, and the Labor Relations Department at Ingalls, West Bank. If a transfer is approved, the employee's departmental records are transferred to the new department and the employee is given a new job designation or description depending on the type of work being done in the new position (AP 226).

The various parts that are fabricated at the fabrication shop are removed therefrom by the Transportation Department and taken to another place on the Ingalls premises for storage or additional work (AP 224).

Additional work may include cleaning, buffing, blasting or painting. After completion of the work the majority of pieces are stored on Ingalls premises until needed. The steel pieces from the storage area are later moved by the Transportation Department to the subassembly area where they are incorporated into larger units. These larger units are later moved to the modular assembly area where modules are constructed. The modules are then moved to the integration area where they are fitted together (AP 224). All the work performed on the pieces after they have left the fabrication shop is done by employees from other departments (AP 226). The material flow and construction process is shown in Exhibit "L" (AP 238).

The fabrication shop is used for cutting, shaping, tacking, and welding steel parts which are used in the construction of ships and other seagoing vessels (AP 223). Ingalls, West Bank, is engaged only in the construction of new ships and does no repair work.

Morgan was an entirely land based employee who had never been aboard a launched vessel at Ingalls and who had never been assigned duties at or over water and whose regular duties never required that he go upon a vessel that was launched or situated upon navigable waters.

The fabrication shop is located 910 yards from the Gulf on the south and 481 yards from the Pascagoula River on the east as shown in Exhibits "H" and "K" (SUPP. AP 1, 26).

Morgan was killed in Bay No. 2 of the fabrication shop at Ingalls West Bank when a large steel plate fell upon him (AP 222).

ARGUMENT

I. Congress Did Not Extend The LHWCA To Employees Of A Shipbuilder Who Were Shore-Based, Non-Maritime And Would Not Otherwise Be Covered By The Act For Part Of Their Activities.

Petitioner controverted the claim filed by the widow and dependents of Morgan with the U.S. Department of Labor, Bureau of Employee's Compensation for benefits under the LHWCA, contending that the claim fell within the Mississippi Workmen's Compensation Act rather than the LHWCA. The ALJ awarded benefits; the BRB and Fifth Circuit Court of Appeals affirmed the award.

The Petitioner is aware of the remand of *Perdue*[5] for reconsideration by the Fifth Circuit in the light of *Caputo*, and that the court denied certiorari in *Halter*[6] and *Dravo*.[7] The court has yet to grant certiorari in a case involving the impact of the 1972 amendments to the LHWCA on the vast shipbuilding industry.

Morgan's injury would not have been covered under the pre-1972 LHWCA. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). The adoption of the amendments to establish ". . . a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity",[8] was motivated out of a ". . . desire to provide continuous coverage throughout their employment to those *amphibious workers* who, without the amendments, would be covered only for part of their activity."[9] (emphasis added)

Morgan was not an amphibious worker. He was a land-based, non-maritime employee working in the fabrication shop of Litton. The thorough analysis by the unanimous court in *Caputo* of the legislative history of the amended Act, the congressional and judicial history of the prior act, and the applicable principles of law, indicate that with respect to shipbuilding, a non-maritime, shore-based employee, no part of whose activity would have been covered by the prior Act is clearly not engaged in ". . . maritime

5 *Jacksonville Shipyards v. Perdue*, 539 F.2d 533 (5th Cir. 1976) Perdue was a ship repairman.
6 *Halter Marine Fabricators, Inc. v. Nulty*, No. 76-880, cert. denied, 97 S.Ct. 2973, 53 L.ed.2d ____.
7 *Dravo Corp. v. Maxin*, No. 76-1093, 97 S.Ct. 2973, 53 L.ed.2d ____.
8 *Caputo*, supra, 45 LW 4735, 97 S.Ct. 2348, 53 L.ed.2d ____.
9 *Caputo*, supra, 45 LW 4735, 97 S.Ct. 2348, 53 L.ed.2d ____.

employment". However, as the court observed, the question of what is meant by "maritime employment" ". . . is made difficult by the failure of Congress to define the relevant terms . . ."[10] In *Caputo* the court declined to look beyond sub-categories of longshoremen and persons engaged in the longshoring operations,[11] and declined to pass on the Director's view that "Maritime employment include(s) all physical tasks performed on the waterfront and particularly those tasks necessary to transfer cargo between land and water transportation." (*Caputo*, at 45 LW 4735) It is now important for the court to fashion a definition of "maritime employment" applicable to the shipbuilding industry. The congressional reports will be of little help. The original versions of the Senate and House bills did not contain the definition of the terms "employee" or "navigable water" as they later appeared in the final version of the Act, nor did the term "shipbuilder" appear until the final version of the amendments was reported by the Senate Committee on Labor and Public Welfare.[12]

In its final response to the *Nacirema*[13] invitation, Congress gave the longshoremen greater benefits, limited his right to recover against the shipowner, and gave his employer, the stevedore, assurance that its liability for the substantial increase of benefits would be exclusive and would not be increased, and abolished the *Sieracki-Ryan* circle of liability.

But that is not all Congress did. In an almost casual, offhand way, the vast industry of shipbuilding was

10 *Caputo*, supra, 45 LW 4733, 97 S.Ct. 2348, 53 L.ed.2d ____.
11 *Caputo*, supra, Footnote 25.
12 S. Rep No. 92-1125, 92d Cong., 2d Sess, p. 24
13 *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969)

brought into the scope of the LHWCA, to an extent not specified by Congress. Uncounted hours of effort on the part of groups having their own special interest in the shipping, longshoremen and stevedoring industries are represented in the committee reports.[14] But Congress did not seek, nor did it have before it, information from which it could determine the number of accidents occurring in shipyards or the cost impact on the shipbuilding industry.

To fashion a definition of "maritime employment" applicable to the shipbuilding industry, petitioner contends that this court must look to its precedents in the admiralty and maritime field and must "proceed with caution . . ."[15] We believe that the observation of the Ninth Circuit Court of Appeals[16] that the amendments contained a ". . . clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee", is the proper major premise on which to build that definition. A non-amphibious, shore-based, non-maritime employee, no part of whose activity was previously covered, has no realistic relationship to admiralty.

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14 "The main concern of the amendments was not with the scope of coverage but with accommodating the desires of three interested groups . . . shipowners . . . employees of longshoremen & . . . workers" *Caputo*, 45 LW 4732, 97 S.Ct. 2348, 53 L.ed.2d ____. The shipbuilding industry was not a party to nor did it benefit by the compromises.

15 *Victory Carriers, Inc. v. Law*, 404 U.S. 212

16 *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975)

II. The "Ongoing Shipbuilding" Test Adopted By The Fifth Circuit Court Of Appeals In *Halter Marine* As Applied To This Case Ignores The ". . . Clearly Expressed Congressional Perpetuation Of The Essential Element Of Admiralty Jurisdiction Over The Employee . . ." Which Is Apparent From The Congressional Hearings. There Is A Conflict In The Case Sub Judice, With Settled Principles Of Admiralty And Maritime Law Adopted By This Court And The Decision Of The United States Court Of Appeals For The Ninth Circuit In *Weyerhauser*.

While Morgan was not an amphibious employee, he was working on a sheet of steel ultimately destined to become part of a vessel which had yet to be constructed. The Fifth Circuit Court of Appeals, applied its ". . . ongoing shipbuilding . . ." test formulated in *Halter*[17] to Morgan, holding that he was covered. Nulty, the injured claimant in *Halter*, met the amphibious employee test; he would go aboard an existing vessel from time to time, although most of his work was ashore. Prior to the amendments Nulty's shoreside accident would have been covered by State Workmen's Compensation Laws and not by the LHWCA. The adoption, in the '72 amendments to the Act, of a ". . . uniform compensation system to apply to employees who would otherwise be covered by this Act for part of (his) activity", clearly extended coverage to that amphibious employee.

The extension of coverage in this case to a non-maritime employee is contrary to the interpretation of

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17 *Halter Marine Fabricators v. Nulty*, No. 76-880, cert. denied 97 S.Ct. 2973, 53 L.ed.2d ____.

the Act by the Ninth Circuit Court of Appeals. That Circuit felt that for the injury to be compensable there must be a traditional maritime nexus with the injury.

The court said:

> We hold that for an injured employee to be eligible for federal compensation under LHCA (sic), his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistic significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters, with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in Sect. 903. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972)." (and other authority)

While the Fifth Circuit may have been justified in concluding that Nulty was an Amphibious employee,[18] there was no basis to conclude that Morgan was such an employee, unless the Fifth Circuit looked to the status of the employer rather than the non-maritime status of the employee. *Weyerhauser* rejected the suggestion that "maritime employment" means "any employment", and did so by requiring that the ". . . employment must have a realistic relationship to the traditional work and duties of a ship's service employment."[19]

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18 *Halter Marine Fabricators*, supra, 543.

19 *Weyerhauser*, supra, at p. 961.

The Fifth Circuit's "ongoing shipbuilding test" looks to the status of the employer, which, in this case, is clearly that of a "shipbuilder", within the meaning of the Act. Having established that status of the employer, it then reasons that even a non-amphibious, non-maritime shore based employee is covered by the Act, because his employer is engaged in shipbuilding. We submit that the better test is found in *Weyerhauser*, and the petition should be granted to resolve this conflict in the circuits.[20]

If, as we have argued, the amendments did not include a non-maritime, non-amphibious, shore based employee, then the amendments as they relate to shipbuilding are consistent not only with the primary purposes underlying the amendments, but with the committee reports and traditional maritime concepts. The results we have suggested, moreover, would avoid ". . . harsh and incongruous results . . .", accommodate "the expansive view of the extended coverage"[21], would not create an overlapping of federal-state jurisdiction, and would not "revitalize the shifting and fortuitous coverage that Congress intended to eliminate."[22] The error in the Fifth Circuit's ongoing shipbuilding test lies with its rational divination of the intent of Congress.

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20 *Weyerhauser* involved the extension of coverage of the Act to a subcategory of employees not formerly covered unless the injury occurred on navigable waters and his employer had ". . . an employee (not necessarily the injured employee) engaged in maritime employment . . ." P. 960. Morgan would not have been covered under the pre-1972 Act, unless he had been injured aboard a vessel in navigable waters. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

21 *Caputo*, 45 LW 4734, 97 S.Ct. 2348, 53 L.ed.2d ____.

22 *Caputo*, 45 LW 4736, 97 S.Ct. 2348, 53 L.ed.2d ____.

III. If The Fifth Circuit Court Of Appeals Has Correctly Divined The Intent Of Congress To Include Landbased, Non-Maritime Employees Of A Shipyard Who Would Not Otherwise Be Covered By The Act For Part Of Their Activity, Then Congress Exceeded Its Authority Under Article III, Section II, P.1 Of The Constitution.

Petitioner's suggestion in the Fifth Circuit that that court's interpretation of the Act distorted the contours of admiralty jurisdiction by a disquieting bulge to the extent that the Act was unconstitutional, was answered by that court by reference to Part IV of *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 544-546.

The court rejected the Halter attack on the constitutionality of the Act because of "... Congress' broad powers to expand the reach of admiralty jurisdiction."

While the court may have been correct in applying that approach to Halter's amphibious employee, we argued there, and desire to develop fully here, that while the inclusion by Congress in a casual, almost haphazard way, of the shipbuilding industry[23] in the Act may have been appropriate for amphibious maritime employees, the requirement that the injured worker be "engaged in maritime employment" (without defining that term) meant that the courts must look to traditional maritime concepts as the

23 An industry never before considered maritime, *Thames Tow Boat Co. v. The Schooner McDonald,* 254 U.S. 242 (1920); *Tucker v. Alexandroff,* 183 U.S. 424 (1902)

Ninth Circuit did in *Weyerhauser* and as this court did in its unanimous decision in *Executive Jet Aviation v. Cleveland.*[24]

A shore based, non-maritime employee of a non-maritime industry has no more nexus to a "... traditional maritime activity,"[25] than the plane crash in *Executive Jet* and to the extent Congress sought to include him within the LHWCA it did not scrupulously confine its jurisdiction to "... traditional maritime activity involving navigation and commerce on navigable waters."

We are not suggesting that this court adhere to those principles out of some blind allegiance to hoary dicta. On three occasions[26] this court has recognized that:

> ... Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.

We think that it is beyond question that when congress required that the injured employee be "engaged in maritime" employment without defining that term, it recognized that there were limitations to its ability to move the Jensen line shoreward. Just as this court suggested in *Nacirema* that the invitation to move the Jensen line shoreward should be addressed to congress; the congress has invited the courts to define

24 409 U.S. 249 (1972)
25 *Executive Jet Aviation,* at p. 261
26 *Healy v. Ratta,* 292 U.S. 263, *Victory Carriers, Inc. v. Law,* 404 U.S. at 212, and *Executive Jet,* at 273.

"engaged in maritime employment". We suggest that as the act applies to the shipbuilding industry — one entirely different from the longshoremen, ship repair ship breaking or harbor worker industries[27] — the Ninth Circuit and *Executive Jet* approach give ". . . due regard for the rightful independence of state governments . . .", provide a proper adherence to settled principles of maritime law, and should be followed.

CONCLUSION

For the reasons assigned, Petitioner suggests that a petition for writ of certiorari should issue to the United States Fifth Circuit Court of Appeals for consideration of all questions, including subsidiary questions herein briefed.

Respectfully submitted,

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27 The Fifth Circuit in *Halter* rejected the contention that in extending coverage to the shipbuilding industry, congress had to ". . . find a 'contract' or 'tort' peg upon which to hang its legislation." (*Jacksonville Shipyards v. Perdue*, at page 545) Of all the industries covered by the amended act, the shipbuilding industry was the only one, traditionally, non-maritime in nature. We do not suggest a total immunity from the reach of the act for the shipbuilding industry, but do suggest that the rejection by the Fifth Circuit of a "contract" or "tort" peg may be wrong in the light of Mr. Justice White' comment in Footnote 7 in *Nacirema*, that the "Act combines elements of both tort and contract," and under Supreme Court Rule 23, the error may be considered "a subsidiary question . . ." to be briefed on the merits.

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Attorneys for Petitioner

CERTIFICATE

I, George E. Morse, one of counsel for the Petitioner in the above styled matter, hereby certify that I have this day mailed a true copy of the foregoing Petition for Writ of Certiorari to Mr. Bobby O'Barr, Attorney at Law, P. O. Box 541, Biloxi, Ms. 39533, and Miss Laurie M. Streeter, Associate Solicitor, United States Department of Labor, Room N-2716 NDOL, Washington, D.C. 20210.

This ____ day of September, 1977.

APPENDIX "A"

INGALLS SHIPBUILDING CORPORATION, DIVISION OF LITTON SYSTEMS, INC., Petitioner,

v.

Dorothy T. MORGAN, Ernest W. Morgan, Jr., Timothy E. Morgan, Claimants-Respondents,

Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

No. 76-1880.

United States Court of Appeals, Fifth Circuit.

April 20, 1977.

Petition for Review of an Order of the Benefits Review Board (Mississippi Case).

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

PER CURIAM:

Petitioner Ingalls Shipbuilding Corporation appeals from a decision of the Benefits Review Board, U. S. Department of Labor, affirming an award of benefits to respondents under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. Respondents' decedent, Ernest W. Morgan, worked as a ship fitter helper apprentice in a fabrication shop in the Ingalls shipyard in Pascagoula, Miss. Workers in the shop cut, shape, tack and weld steel parts later used for construction and repair of ships. Morgan died when a steel plate he was cleaning fell on him.

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* District Judge of the Southern District of Florida sitting by designation.

Ingalls questions whether, under the terms of the Act, Morgan was a covered employee, 33 U.S.C. § 902(3), working on a maritime situs, 33 U.S.C. § 903(a). If he was, Ingalls suggests the Act is unconstitutional. These issues are controlled by *Halter Marine Fabricators Inc. v. Nulty, decided with Jacksonville Shipyards Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed* 45 U.S.L.W. 3514 (Jan. 25, 1977). *Nulty* upheld an award of compensation benefits to a worker in a shipyard fabrication shop and determined the Act so applied was constitutional. Nulty was covered, the Court held, because he was "directly involved in an ongoing shipbuilding operation." 539 F.2d at 544.

Ingalls suggests three possible reasons for distinguishing the status of Morgan from the status of Nulty. First, at the time of his injury, Morgan was only cleaning, while Nulty was constructing. Because cleaning was a necessary prerequisite to the fabrication of the steel for use in shipbuilding, this distinction is immaterial. Second, Morgan was working on a steel plate for a ship that had not yet been launched, while Nulty was fabricating a piece of woodwork for a floating vessel. The work of shipbuilding, however, commences before there is a launched vessel. Third, Morgan never worked on board a ship, while Nulty did from time to time. Shipbuilders who do the initial work to construct a vessel for launching are, nonetheless, just as engaged in shipbuilding as those who are completing the task after something is finished which can be called a ship.

Morgan's cleaning task was an essential step of the shipbuilding process, and it defies plain meaning of

the words "ongoing shipbuilding operation" to restrict them to activities that relate to vessels that are already floating. Ingalls argues that the "ongoing shipbuilding" test is wrong if it eliminates any requirement that the status of the injured employee be judged without regard for traditional maritime concepts. *Nulty*, however, holds that shipbuilders perform a maritime function.

AFFIRMED.

APPENDIX "B"

DOROTHY T. MORGAN (Widow)
ERNEST W. MORGAN, Jr. and
TIMOTHY E. MORGAN (Minor Children)
(ERNEST W. MORGAN, deceased)

Claimants-Respondents

versus BRB No. 75-159

INGALLS SHIPBUILDING CORPORATION
DIVISION OF LITTON SYSTEMS, INC.

Self-Insured Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DECISION

Digest Section | Syllabus

1806 A ship fitter helper apprentice working in a shop for cutting, shaping, tacking, and welding parts which were later used in the construction and repair of vessels was then engaged in maritime employment within the meaning of Longshoremen's Act Section 2(3).

p. 312

1809 A shop used for fabrication of parts used in the construction and repair of vessels is an adjoining area on navigable waters within the meaning of Longshoremen's Act Section 3(a), since such an adjoining area is bounded only by its use as a maritime enterprise, and the shop was designed and used for ship construction and repair.

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960 Participation of the Director, Office of Workers' Compensation Programs, in the hearing of a Longshoremen's Act claim before an administrative law judge was proper, since the Secretary of Labor or his designee is authorized to appear and participate in any formal hearing held pursuant to the regulations implementing the Act on behalf of the Director, as a party in interest, and the question of the scope of jurisdiction under the Act is a substantial legal issue that affects the administration of the Act.

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Appeal from Decision and Order of Thomas F. Howder, Administrative Law Judge, United States Department of Labor.

Bobby G. O'Barr, Biloxi, Mississippi, for the claimants.

Eldon L. Bolton, Jr., (White and Morse), Gulfport, Mississippi, for the employer.

Linda L. Carroll (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal from a Decision and Order (75-LHCA-129) of Administrative Law Judge Thomas F. Howder pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (hereinafter referred to as the Act).

On June 22, 1973, Ernest W. Morgan was fatally injured during the course of his employment at Ingalls Shipbuilding Corporation in Pascagoula, Mississippi. Morgan was employed as a ship fitter helper apprentice in the fabrication shop. The shop was used for cutting, shaping, tacking, and welding steel parts which were later used in the construction and repair of

ships and other seagoing vessels. Morgan was killed when a steel plate fell on his pelvic area.

The administrative law judge found that Morgan's death was covered by the Act and benefits were awarded accordingly.

Employer appeals contending that Morgan was not an employee under Section 2(3) of the Act, Ingalls Shipbuilding Corporation was not an employer under Section 2(4) of the Act, and the situs of the accident was not covered under Section 3(a) of the Act. 33 U.S.C. §§902(3), 902(4) and 903(a). It is also argued that the amendments to the Act if construed as extending the Act's jurisdiction to the situs of this accident are unconstitutional. Employer also objects to the participation of the Director, Office of Workers' Compensation Programs in this case.

Employer admits that deceased was an employee but asserts that deceased was not a covered employee pursuant to Section 2(3) of the Act because he was not engaged in maritime employment. This argument will not bear close examination. Section 2(3) of the Act defines "employee" to be "any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker *including a ship repairman, shipbuilder* . . . ." (emphasis added). 33 U.S.C. §902(3).

The employer is in the business of ship construction and repair. Morgan was among those employees whose work contributed to this construction and repair. On the day he was fatally injured, Morgan was

working on steel parts which were used in the actual construction and repair of vessels. The Board finds this to be an essential aspect of the employer's shipbuilding enterprise and thus maritime employment within the meaning of the Act. *Nulty v. Halter Marine Fabricators, Inc.*, 1 BRBS 437, BRB No. 74-179 (May 2, 1975); *Skipper v. Jacksonville Shipyards, Inc.*, 1 BRBS 533, BRB No. 74-213 (June 11, 1975); *Maxin v. Dravo Corp.*, 2 BRBS 372, BRB No. 75-145 (Oct. 20, 1975); 1A BENEDICT ON ADMIRALTY §16 (7th ed. rev. 1973).

Section 2(4) of the Act defines an employer as anyone "whose employees are engaged in maritime employment." 33 U.S.C. §902(4). As it has been established that Morgan was an employee in maritime employment, it follows that Ingalls Shipbuilding Corporation was an employer under the Act.

Section 3(a) of the Act requires that an injury, to be compensable under the Act, must take place on navigable waters which includes "any adjoining area used by an employer in . . . repairing or building a vessel." 33 U.S.C. §903(a). The record indicates coverage in that claimant was obviously working in an area that played an integral part in the building and repairing of vessels. *Nulty v. Halter Marine Fabricators, Inc., supra*. Employer, however, contends that the fabrication shop was not in an adjoining area. An adjoining area as defined in the Act must be deemed bounded only by the limits of its use as a maritime enterprise. The entire facility at which Morgan worked was designed and used for ship construction and repair. Therefore, the jurisdictional requirements of Section 3(a) of the Act are satisfied. *Maxin v. Dravo Corp., supra; Perdue v. Jacksonville Shipyards, Inc.*, 1 BRBS 297, BRB No. 74-200 (Jan. 31, 1975); *Skipper v. Jacksonville Shipyards, Inc., supra*.

Employer also asserts that if jurisdiction is found to lie, the amendments extending jurisdiction to the activities in "adjoining areas" are unconstitutional. The Board in *Coppolino v. International Terminal Operating Co.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974), stated that it was clear that there was Congressional authority for the extension of jurisdiction in the longshoring and shipbuilding industries both via its maritime jurisdiction and its power to regulate commerce. There is no reason to reiterate that discussion here.

Further, employer objects to the participation in this case of the Director, Office of Workers' Compensation Programs. Administration of the benefits program under the Act is the responsibility of the Director, Office of Workers' Compensation Programs, 20 C.F.R. §§701.201, 701.202. The Solicitor of Labor or his designee is authorized to appear and participate in any formal hearing held pursuant to the regulations implementing the Act on behalf of the Director, as a party-in-interest. 20 C.F.R. §702.333(b). In that the question of the scope of jurisdiction under the Act is a substantial legal issue that affects the administration of the Act, the Director's participation in this case is proper. *See Arnold v. Mast*, 1 BRBS 246, BRB No. 74-148 (Dec. 20, 1974).

The claimant's attorney has requested approval of a fee for services rendered in successful defense of this appeal. Having submitted to the Board a statement of the extent and character of the necessary legal services rendered, in accordance with the applicable Rules and Regulations, 20 C.F.R. §§702.132, 802.203, the

claimant's attorney is awarded a fee of $1325.00 to be paid directly by the employer in a lump sum. 33 U.S.C. §928.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

Dated this 19th day
of March, 1976.

APPENDIX "C"

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

IN THE MATTER OF

ERNEST W. MORGAN (Dec'd) BY
DOROTHY T. MORGAN (Widow) AND
ERNEST W. MORGAN, JR. AND
TIMOTHY E. MORGAN (Minor Children)
Claimants,

versus

Case No. 75-LHCA-129
(Formerly 6-18963)

INGALLS SHIPBUILDING CORP.
DIVISION OF LITTON SYSTEMS, INC.
Self-Insured Employer
Respondent.

Bobby G. O'Barr, Esq.
Hurlbert & O'Barr
P. O. Box 541
Biloxi, Mississippi 39533
For the Claimants

Elden L. Bolton, Jr., Esq.
White & Morse
P. O. Drawer 100
Gulfport, Mississippi 39501
and
David T. Dana, III, Esq.
Litton Industries
360 North Crescent Drive
Beverly Hills, California 90210
For the Respondent

Karen Gilbert, Esq.
(William J. Kilberg, Solicitor of Labor
Marshall H. Harris, Associate Solicitor of Labor)
For the Director, Office of Workers' Compensation Programs United States Department of Labor
Party in Interest

Before: THOMAS F. HOWDER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.* (hereinafter "Act") and the Rules and Regulations implementing the Act, 20 C.F.R. Parts 701 and 702.

The parties waived their right to a formal hearing, and submitted the case by way of stipulation. This has been duly considered, along with the briefs filed.

Findings and Conclusions

This is a claim by the widow and minor sons of Ernest W. Morgan, who, on June 22, 1973, was fatally injured in the course of his employment at the Fabrication Shop of respondent's shipyard in Pascagoula, Mississippi. The dependents of Mr. Morgan are receiving benefits under state workmen's compensation law, and the sole question is whether the federal statute is applicable.

In contending that the unfortunate accident is not covered by the Act, respondent has raised the following points:

1. Whether respondent is an employer within the meaning of the Act.

2. Whether the decedent was an employee within the meaning of the Act.

3. Whether the location of the accident falls within the coverage of the Act.

4. Whether, if the claim is compensable under the Act, Congress has exceeded its constitutional authority in enacting such legislation.

While respondent's contentions, as propounded by counsel in a thoughtful brief, are deserving of con-

sideration, this case is controlled at the administrative judge level by precedents established by the Benefits Review Board.

I refer to the following BRB decisions: *Gilmore* v. *Weyerhaeuser Co.*, BRB No. 74-141 (Nov. 12, 1974); *Avvento* v. *Hellenic Lines*, BRB No. 74-153 (Nov. 12, 1974); *Adkins* v. *I.T.O. Corp.*, BRB 74-123 (Nov. 29, 1974); *Coppolino* v. *International Terminal Operating Co.*, BRB No. 74-136 (Dec. 2, 1974); *Brown* v. *Maritime Terminals*, BRB Nos. 74-177 and 177A (December 6, 1974); *Herron* v. *Brady-Hamilton Stevedore Co.*, BRB No. 74-171 (Jan. 23, 1975); *Perdue* v. *Jacksonville Shipyards, Inc.*, BRB No. 74-200 (Jan. 31, 1975); *Harris* v. *Maritime Terminals, Inc.*, BRB No. 74-178 (Feb. 3, 1975); *Mason* v. *Old Dominion Stevedoring Corp.*, BRB Nos. 74-182 and 74-182A (Mar. 21, 1975); *Ford* v. *P. C. Pfeiffer Co.*, BRB Nos. 74-191 and 74-191A (March 21, 1975); *Di Somma* v. *John W. McGrath Corp.*, BRB No. 74-199 (Apr. 30, 1975); *Mininni* v. *Pittston Stevedoring Corp.*, BRB No. 74-195 (May 1, 1975); and *Nulty* v. *Halter Marine Fabricators, Inc.*, BRB No. 74-179 (May 2, 1975).

The last case cited, *Nulty*, is especially appropriate in resolving the instant matter. There a carpenter sustained injury while working in a carpentry shop in a shipyard fabricating a block to hold a spare wheel for an off-shore supply vessel. The Board held that the injury was compensable under the Act. Here, claimant's duties in the Fabrication Shop included laying out, cutting, shaping and welding steel parts to be used in the shipyard for the building and repairing of ships. The rationale of *Nulty* mandates a finding of

coverage here from the standpoint of both employment status and geographical situs.[1]

The *Nulty* decision is likewise dispositive of the constitutionality issue raised by respondent. See *Coppolino, supra*, BRB No. 74-136, at pp. 6-7.

On the basis of the foregoing findings and conclusions, I issue the following:

ORDER

1. Respondent is liable for and shall pay, pursuant to Section 9(a) of the Act, reasonable funeral expenses of Mr. Morgan, not exceeding $1000.

2. Respondent is liable for and shall pay to Mr. Morgan's widow and two minor sons, pursuant to Section 9(b) of the Act, 66-2/3% of Mr. Morgan's average weekly wages, until otherwise ordered.

3. Interest on accrued payments shall be paid by respondent at the rate of 6% per annum, computed from the date each payment was originally due.

4. A fee for legal services rendered to claimants will be approved in favor of Bobby G. O'Barr, Esq., upon the filing of an application for such fee.

/s/ THOMAS F. HOWDER
THOMAS F. HOWDER
Administrative Law Judge

---

1 While the employer in *Nulty* admitted being an "employer" within the meaning of the Act, the Board's rationale and the clear language of Section 2(4) — especially its reference to shipbuilding and ship repairing — require a finding in this case that respondent is also such an "employer."

Dated: May 19, 1975
Washington, D. C.

I certify that on May 23, 1975 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Sixth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mrs. Dorothy Morgan, Route 1, Box 157, Satsuma, Alabama 36572 — Claimant
Mr. Bobby G. O'Barr, Attorney at Law, Hurlbert and O'Barr, Post Office Box 541, Biloxi, Mississippi 39533
Ingalls Shipbuilding, Post Office Box 149, Pascagoula, Mississippi 39567 ATTN: Mr. Ray Hust
Insurance Carrier or Employer (if self-insured)
Mr. Eldon L. Bolton, Jr., Attorney at Law, White and Morse, Post Office Drawer 100, Gulfport, Mississippi 39501
Mr. David T. Dana, III, Attorney at Law, Litton Industries, 360 North Crescent Drive, Beverly Hills, California 90210

A copy was also mailed by regular mail to the following:

Judge T. Howder, Office of Administrative Law Judges, U. S. Department of Labor, Washington, D.C. 20210

Office of the Solicitor, U. S. Dept. of Labor, Division of Employee Benefits, Rm. 4221, Main Labor Bldg. Wash. D.C. 20210

Director, Office of Workmen's Compensation Programs, (LS/HW) U. S. Department of Labor, Washington, D.C. 20211

/s/ R. H. (ILLEGIBLE)
Deputy Commissioner
Sixth Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workmen's Compensation Programs

APPENDIX "D"

United States Court of Appeals
For the Fifth Circuit

October Term, 1976

No. 76-1880

(Your docket No. BRB 75-159)

INGALLS SHIPBUILDING CORPORATION, DIVISION OF LITTON SYSTEMS, INC.,
Petitioner,

versus

DOROTHY T. MORGAN, ERNEST W. MORGAN, JR., TIMOTHY E. MORGAN,
Claimants-Respondents,

DIRECTORS, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for Review of an Order of the Benefits Review Board (Mississippi Case)

JUDGMENT

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

This cause came on to be heard on the petition of Ingalls Shipbuilding Corporation for review of an order of the Benefits Review Board, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Benefits Review Board in this cause be, and the same is hereby, affirmed.

It is further ordered that petitioner pay to claimants-respondents and respondents, the costs on appeal to be taxed by the Clerk of this Court.

April 20, 1977

Issued as Mandate: MAY 12 1977

APPENDIX "E"

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
33 USC § 901 et seq.
(As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972)

An Act To provide compensation for disability or death resulting from injury to employees in certain maritime employment, and for other purposes.

---

* District Judge of the Southern District of Florida, sitting by designation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Sec. 1. This Act may be cited as "Longshoremen's and Harbor Workers' Compensation Act."[1] [2]

DEFINITIONS

Sec. 1. When used in this Act —

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term* does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

---

1 Includes 1972 amendments made by P.L. 92-576 printed in italic.

2 The amendments (except section 19(d) of the Act) are effective thirty days after enactment (12:01 a.m., November 26, 1972).

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

(5) The term "carrier" means any person or fund authorized under section 32 to insure under this Act and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the

reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. *"Child," "grandchild," "brother" and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over is, (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) of this section.*

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) *The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.*

(17) The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(18) The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is —

(A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof,

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,

(C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary,

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is

prevented by factors beyond his control from pursuing his education. A child shall not be deemed to be a student under this Act during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(22) The singular includes the plural and the masculine includes the feminine and neuter.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-408

INGALLS SHIPBUILDING CORPORATION,
DIVISION OF LITTON SYSTEMS, INC.,
Petitioner,

versus

DOROTHY T. MORGAN, ERNEST T. MORGAN, JR. AND
TIMOTHY E. MORGAN,
Claimants-Respondents,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CASES AND AUTHORITIES (Continued)

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IN THE
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DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Claimants-Respondents pray that a writ of certiorari be denied to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 20, 1977.

JURISDICTION

The Claimants-Respondents do not question the jurisdiction as set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Claimants-Respondents do not question the constitutional provisions and statutes as set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

The Claimants-Respondents do not question the questions presented for review as set forth in the Petition but do ask that this Writ of Certiorari be denied.

COUNTER-STATEMENT OF THE CASE

In 1972 Congress substantially rewrote the conditions for coverage under the Longshoremen's Act. The 1972 Amendments to the Act redefined the term "employee" to specifically include, among others, a longshoreman and a shipbuilder, as well as including generally persons engaged in maritime employment.

In addition the Amendments expanded the area of the Act's applicability — "situs". Prior to the Amendments an injury or death which arose out of and in the course of employment was covered only if sustained upon navigable waters including any dry dock. Congress, however, recognized the inequity of limiting coverage to the gang plank or water's edge. The

Act, therefore, was amended to include injury or death of an employee sustained upon navigable waters including any adjoining pier, wharf, dry dock, terminal area, or other area customarily used to load or unload or to build or to repair a vessel.

These Amendments were designed to insure a uniformly applicable compensation remedy which in Congress' discretion and pursuant to its legislative powers, are necessary to protect the amphibious workers.

This cause arose upon the filing of a claim for death benefits by the surviving wife and minor children of Ernest Morgan pursuant to the provisions of the Longshoremen's and Harborworkers' Compensation Act, as amended.

The facts of this case are not in dispute. Ernest Morgan was employed by the employer herein as a ship fitter helper apprentice at its fabrication shop. This shop is used for cutting, shaping, tacking and welding steel parts which are later used in the construction of ships and other seagoing vessels. (Stipulation, at 3-4).

All of the decedent's work was done within the confines of this fabrication shop which is located on Ingalls West Bank Shipyard which abuts the Gulf of Mexico and the Pascagoula River.

On June 22, 1973, Ernest Morgan was killed in the course of his employment as a result of accidental injury. The injury occurred when a steel plate 26 feet in length, 8 feet wide, and 1 1/4 inches thick, and weigh-

ing approximately 6,000 pounds fell on the decedent's pelvis area, lacerating the right groin and severing the femoral artery.

The surviving widow and minor children sought death benefits for the decedent's death pursuant to the Longshoremen's Act. The employer controverted the claim on the ground that the Act is inapplicable and that the claimant's sole remedy was pursuant to the Mississippi State Workers' Compensation Statute.

The case was submitted to the Office of the Chief Administrative Law Judge pursuant to section 19(d), 33 U.S.C. §919(d), of the Longshoremen's Act. Since there was no factual dispute, the parties agreed to the presentation of this case upon the submission of a stipulation of facts and exhibits. See 20 C.F.R. §702.346 (1974). Based upon this record evidence, the administrative law judge issued a compensation order in favor of the claimants, finding decedent's death compensable pursuant to the Longshoremen's Act, as amended.

The employer filed a notice of appeal from this decision with the Board and requested an order staying payment of the compensation award. Subsequently, counsel for the claimant requested the Board to approve a fee for services performed before the administrative law judge. The employer opposed this request on the ground that the case had been appealed. By orders filed June 18, 1975, the Board remanded the case to the administrative law judge with directions to approve an attorneys fee; the Board also ordered all appellate action stayed. The Board further issued an order denying the request for a stay of payment of

compensation. The employer filed a motion for reconsideration and requested the Board to order a stay of payment of the compensation award. The Board denied this motion by order filed July 3, 1975.

On July 28, 1975, the employer filed a petition for review of the Board's order denying a stay of compensation with the United States Court of Appeals for the Fifth Circuit, the employer sought modification of the Board's order. The employer further filed a motion with the court requesting a stay of compensation pending review, pursuant to Rule 18 of the Federal Rules of Appellate Procedure. The Court, by order filed August 20, 1975, denied the employer's motion to modify the Board's order and denied the stay of payment of compensation. On September 11, 1975 a motion was filed with the court seeking to have employer's petition for review voluntarily dismissed, this motion was submitted on behalf of the employer and the claimants.

On April 20, 1977, the Fifth Circuit Court of Appeals affirmed the action of the Benefits Review Board.

The Claimants-Respondents take issue with the statement of fact contained on page 6, last paragraph of Petitioner's Petition for Writ of Certiorari when it is asserted that Ingalls, West Bank, does no repair work. This statement is not supported in the record, but in Exhibit "N" (AP 240), the job description of a shipfitter requires him to remove and *repair* or replace damaged parts of ship structures. (Emphasis added)

ARGUMENT

I. Congress Did Extend The LHWCA To Employees Of A Shipbuilder Who Were Shore-Based, Non-Maritime And Would Not Otherwise Be Covered By The Act For Part Of Their Activities.

The Longshoremen's and Harborworkers' Compensation Act Amendments of 1972[1] substantially altered and expanded the area of the Act's coverage — "situs" —. Compensation benefits are provided for

> * * * disability or death of an employee, but only if the disability or death results from an injury *occurring upon the navigable waters* of the United States (*including any* adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other *area customarily used* by an employer in loading, unloading, *repairing*, or *building a vessel*.
>
> Amendments, §2(c), 86 Stat. 1251 33 U.S.C. §903(a) (Supp. III, 1973). (Emphasis supplied)

The amendments also eliminated the purely situs orientation of the Act by further conditioning coverage upon a showing that the claimant satisfies a "status" test:[2]

---

1 Pub. L. 92-576, 86 Stat. 1251 *et seq.*

2 Prior to the Amendments, the Longshoremen's Act was applicable only to injuries or deaths sustained upon the navigable waters including any dry dock. 33 U.S.C. §903(a) (1970 ed.); *Nacirema v. Johnson*, 396 U.S. 212 (1969).

> The term 'employee' means any person engaged in maritime employment, *including* any longshoreman or other person engaged in longshoring operations, and *any harborworker including* a ship repairman, *shipbuilder*, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> Amendments, §2(a), 86 Stat. 1251, 33 U.S.C. §902(3) (Supp. III, 1973). (Emphasis supplied.)

The amended Act, therefore, has adopted a new two-pronged test for purposes of determining its applicability namely, "situs" and "status".

There is no dispute that claimant was employed as a shipfitter and was engaged in the process of building ships. (AP 223) At the time of injury, claimant was clearing a main engine plate which would be used or installed aboard a vessel under construction which was Hull 4404. (AP 236 — Exhibit "G") Additionally, the employer admits that it is engaged in the business of new ship construction. (AP 223)

The employer contends, however, that claimant's employment does not satisfy the "status" test, that he is not an "employee" within the meaning of the Act because he was not engaged in "maritime employment" as that term has been "defined and refined, by the courts through the years."

As previously noted an "employee" means:

> Any person engaged in maritime employment, *including* any longshoreman or other person engaged in longshoring operations, and *any harbor-worker including a ship repairman, shipbuilder,* and ship-breaker. . . .
>
> Amendments, §2(a), 86 Stat. 1251, 33 U.S.C. §902(3) (Supp. III, 1973). (Emphasis supplied)

This definition expressly expands and includes within the term maritime employment, for purposes of "status", the subsequently enumerated persons and specifically includes shipbuilders. Indeed, as noted in a leading treatise:

> It is evident that the intent of the Congress in defining the term employee as it has in this Act [amended Longshoremen's Act] is to include within the coverage of the Act all maritime employees, other than those specifically excluded. *In order to leave no room for any doubt,* longshoremen and persons performing longshoring operations *are specifically included,* and *so are harbor workers,* ship repairmen, *shipbuilders,* and ship breakers *so that in the case of such persons it is quite unnecessary to engage in any abstract discussion of the meaning of maritime employment.*
>
> 1A *Benedict on Admiralty,* §16 (7th Ed. (rev.) 1973) (Emphasis supplied).

The correctness of this analysis of the definition of "employee" is not only apparent from the statutory language but is further supported by the legislative history of the 1972 Amendments.

The Section-By-Section Analysis of S. 2318,[3] which is included in the Report of the Senate, S. Rep. No. 92-1125, 92d Cong., 2d Sess., at 16 provides:

> Section 2(a) amends section 2(3) of the Act to define 'employee' as any person engaged in maritime employment. *This definition specifically includes any* longshoreman or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, *shipbuilder* and ship-breaker. * * *
>
> S. Rep. No. 92-1125, at 16. (Emphasis supplied)

See also, Report of the House of Representatives, H.R. No. 92-1441, 92d Cong., 2d Sess., at 14.

We submit, therefore, that the statutory definition of "employee" as supported by the legislative history conclusive proves that Congress intended and expressly provided for the inclusion of any shipbuilder within the definition of employee. Thus, we submit all that remains to be determined for purposes of the applicability of the Act is whether claimant is a shipbuilder.

---

3 S. 2318 was the bill ultimately passed by Congress as Pub. L. 92-576, the 1972 Amendments to the Act which is presently under review.

In the decision and order under review, the Board affirmed the findings of the trier of facts that the claimant was a shipbuilder. The administrative law judge concluded that claimant's duties were essential to and vital to the building and repairing of ships.

The employer, however, has failed to note that the proposed guidelines issued by the Department of Labor which specify covered employees without attempting to be all inclusive or exclusive, lists the types of work performed in adjoining areas which are covered.[4]

These proposed guidelines, we submit, suggest that the determination of the Act's applicability must be predicated upon a functional analysis of a claimant's duties. That Congress intended "status" to be determined by such functional analysis is suggested by the comments of Congressman Steiger of Wisconsin:

> The latter change [new definition of 'employee'] was made so that a determination of coverage can be made on the basis of the definition of 'employee'. Under the present law that definition is so vague that the determination must be made on the basis of whether the injured individual was working for a covered 'employer'. The *expansion of coverage is intended to bring about a measure of compensation uniformly applicable to persons customarily considered to be working in the business*. Thus even if an employee does not

4 See proposed Department of Labor Guideline, §7105, 39 *Fed. Reg.* 18269 (1974), listing work in "Fabricating Shops" as illustrative of a type of shipyard work which may be covered.

> happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harbor worker, whether engaged in repairing a vessel or unloading it.
>
> 118 Cong., Rec. 36389
> (Emphasis Supplied)

We submit that Congress did not intend to restrict the benefits of the Act in the manner advanced by the employer — limiting coverage to persons only if a part of their activities is directly involved in installing the fabricated parts onto the vessels on navigable waters, drydocks, marine railways or on building ways. The construction of a vessel requires the skills and services of a diverse and varied class of workers. This work is performed in a variety of places, not limited to the area surrounding the hull of the vessel. Indeed, in amending the Act, Congress recognized the numerous areas in which a covered employee would be employed, and it expressly included an injury sustained on "any adjoining pier, wharf, *dry dock*, terminal, *building way, marine railway, or other adjoining area customarily used* by an employer in . . . building a vessel." Amendments §2(c), 86 Stat. 1251, 33 U.S.C. §903(a) (Supp. III, 1973).

It is submitted that Ernest W. Morgan was an employee as that term is defined in 33 U.S.C.A. §902(3).

II. The "Ongoing Shipbuilding" Test Adopted By The Fifth Circuit Court Of Appeals In *Halter Marine* As Applied To This States The ". . . Clearly Expressed Congressional Perpetuation Of The Essential Element Of Admiralty Jurisdiction Over The Employee . . ." Which Is Apparent From The Congressional Hearings. There Is No Conflict In The Case Sub Judice, With Settled Principles Of Admiralty And Maritime Law Adopted By This Court And The Decision Of The United States Court Of Appeals For The Ninth Circuit In *Weyerhauser*.

Section 3(a) of the Act includes as the navigable waters of the United States,

> any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area customarily used by an employer in loading*, unloading, *repairing, or building a vessel*. 33 U.S.C. §903(a) (Emphasis Supplied)

Ingalls' Fabrication Shop is a building 332 feet by 666 feet located on the premises of Ingalls' West Bank Shipyard. (See Exhibits "K" (Supp. AP 26) and "L" (Supp. AP 27). The center of the building is over 910 yards or approximately one-half mile from the Gulf of Mexico to the south and over 481 yards or approximately one-quarter mile from the Pascagoula River to the east. As Exhibit "L" (Supp. AP) and the stipulations of record demonstrate, the operations in the Fabrication Shop comprise various stages in a total

and integrated shipbuilding process as it occurs at Ingalls' yard in Pascagoula, Mississippi. Raw steel is brought into the yard by barge or rail. It is moved by cranes, fork-lifts, and other machinery inside the Fabrication Shop, where ship parts and units — framing and various foundation structions are fabricated and constructed. They then are transported to another place on Ingalls' premises for further work[5] or storage. Three to five percent of the structures go directly to the modular assembly or integration area. As the parts or components are needed, they are moved from a storage area to the sub-assembly area where they are incorporated into larger units. Then they are moved to the integration area where they are fitted together or further integrated. The integrated modules are launched by means of the launch pontoon. The entire process is diagramed in Exhibit "L". (Supp. AP 27)

The evidence of record unquestionably shows that Ingalls' West Bank Shipyard, adjoining navigable waters on the south and the east, is, in its entirety, an area customarily used in shipbuilding. Apparently no other business is conducted at the shipyard, and shipfitters employed by Ingalls' in furtherance of this business, work either in the Fabrication Shop, as Morgan did, or in other designated areas in the yard.[6] See Exhibit "L". (Supp. AP 27)

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5 Further work may include cleaning, buffing, blasting or painting.

6 In March 1973, there were two Departments at Ingalls for the Shipfitter classification, those assigned to work on launched ships, on erection in the modular assembly area, or on subassembly in the sub-assembly area and those assigned to the Fabrication Shop. Transfers either by initiative of the employee or management are subject to approval by the General Superintendent of Fabrication and the Director of the department involved. (AP 226)

The only conceivable argument that could be presented in opposition to a proposed finding that the situs of Morgan's fatal injury is within the Act's coverage, is an argument that is totally spurious: that the Fabrication Shop does not actually touch the water. To argue that the immediate "area" of the injury must touch the water is to argue the absurd. Given the magnitude of modern shipbuilding operations, necessitated by the size of the ships themselves, which are often over 1000 feet long, an area customarily used by an employer in the ship construction business, an area like the Fabrication shop, would *never* touch the water. Only the dry docks and, as shown in Exhibit "L", (Supp. AP 27) the launching pontoon, and the outfitting docks actually touch the water. The stipulations and Exhibits show unequivocally that the areas used in the shipbuilding process include the Fabrication shop where Morgan was killed. In fact, the entire West Bank Shipyard, utilized by Ingalls in its ship construction business, and bordered on two sides by navigable waters, is an "adjoining area" within the meaning of §3(a) of the Act. Morgan who suffered a fatal injury in the Fabrication Shop when a steel plate 26 feet in length, 8 feet wide, and 1 1/4 inches thick, weighing approximately 6,000 pounds fell on him, was clearly in an adjoining area customarily used by an employer in shipbuilding.

Subsequent to the case of *Jackson Shipyard, Inc. vs. Perdue*, 539 Fed. 2d 533 (5th Cir. 1976), the Third Circuit in *Dravo Corp. vs. Maxin*, 545 Fed. 2d 374 (3rd Cir. 1976), had an opportunity to pass on the new amendments of the Longshoremen's and Harbor

Workers' Act. In the *Dravo* case, Maxin was working in the structural steel shop, in his usual place of employment, burning steel plates which would ultimately become bottoms and decks of barges fabricated at Dravo, when he sustained an injury resulting in a below-knee amputation of both legs. The enclosed structural steel shop was located about 2000 feet from the north channel of the river. The Third Circuit, citing *Jacksonville Shipyard, Inc. vs. Perdue*, supra., held that the Claimant's employment in relationship with Dravo fell within the perimeters of the term "shipbuilding". The Court stated as follows, to-wit:

> * * * On the facts of this case, it is clear that Maxin's employment functions for Dravo were an intergal part of the new ship construction activity conducted there. We conclude therefore, that the Claimant satisfied the 'functional relationship' test of *Johns* and extent of the expanding coverage of the 1972 Amendments.

It is submitted that the "ongoing shipbuilder" test as applied in this case carries out the intent of Congress in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

III. The Fifth Circuit Court Of Appeals Has Correctly Defined The Intent Of Congress To Include Land-Based, Non-Maritime Employees Of A Shipyard Who Would Not Otherwise Be Covered By The Act For Part Of The Activity. Congress Did Not Exceed Its Authority Under Article III, Section II, P. 1 Of The Constitution.

Article III, Section 2 of the United States Constitution provides: "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . ." There is no limitation on this grant beyond that contained in the words "admiralty" and "maritime". Likewise, while containing no express grant of legislative power over the substantive law, the Supreme Court has historically recognized Congress' power in this area. *See*, e.g., *The Lottawana*, 88 U.S. (21 Wall.) 558 (1875); *Panama Railway Co. v. Johnson*, 264 U.S. 382 (1924); *Crowell v. Benson*, 285 U.S. 22 (1932); *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934); *Romereo v. International Terminal Operating Co.*, 258 U.S. 254 (1959). As the Court stated in *Panama Railway*, *supra*.,

> [T]here is no room to doubt that the powers of Congress extends to the entire subject and permits of the widest discretion.
>
> * * *
>
> Congress is empowered by the constitutional provision to alter, qualify or supplement the maritime rules.
>
> 264 U.S. at 386, 388.

Likewise, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1922), the Court held:

> The Congress thus has paramount power to fix and determine the maritime law which shall prevail throughout the country.

In *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 52 (1934), the Court reasserted the principle that Congress, pursuant to its powers in Admiralty, is not limited by prior decisions of the Court:

> The authority of Congress to enact legislation of this nature [Ship Mortgage Act] was not limited by previous decision as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that over experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters. *The Genesis Chief*, 12 How. 443, overruling *The Thomas Jefferson*, 10 Wheat. 428.

Accord, Panama Railroad, Co., supra.

We do not suggest that Congress' admiralty and maritime powers are limitless. In *Panama Railroad Co., supra.*, while acknowledging Congress' "wide discretion to alter, supplement, or modify admiralty

and maritime jurisdiction," the Court noted that there were two restrictions upon this power: Congress is restrained from enacting legislation which would undermine the uniformity of maritime law thereby contravening the constitutional policy of uniformity, and, legislation can not alter the boundaries of maritime law and admiralty jurisdiction "which inhere in those subjects . . . as by excluding a thing falling clearly within them or including a thing falling clearly without. 264 U.S. at 386.

The 1972 Amendments clearly do not contravene the constitutional policy of uniformity. The Act, by its terms, applies to all persons who satisfy the "situs" and "status" requirements and compensation is not dependent upon or affected by varying state laws. Indeed, one of the primary concerns expressed by Congress in amending the Act was to insure its uniform application. *See* S. Rpt. #92-1441, 92d Cong., 2d Sess., at 12; H. Rpt. #92-1441, 92d Cong., 2d Sess., at 10.

Likewise, the amended Act does not contravene the boundaries which inhere in admiralty and maritime jurisdiction.

The boundaries of admiralty and maritime jurisdiction have never been concretely defined or identified. As Mr. Justice Holmes noted in *The Blackheath*, 195 U.S. 361, 365 (1904): "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of a very accurate history." Indeed, the Supreme Court reasserted this principle in the *Detroit Trust Co. vs. Barlum*, 293 U.S. *supra*., at 43:

> The constitution did not undertake to define the precise limits of that body of law or to lay down a criterion for drawing the boundary between maritime law and local law. Boundaries were to be determined in the exercise of the judicial power in recognition of the purpose of the grant.
>
> * * *
>
> The framers of the Constitution did not contemplate that the maritime law should remain unalterable.
>
> (Citations omitted)

Likewise, the Supreme Court has historically rejected the concept that our admiralty and maritime jurisdiction was limited to or confined to the meaning given to those terms by the English courts at the time the Constitution was adopted. See *e.g., The Genesee Chief*, 53 U.S. (18 How.) 443 (1851). Indeed, the Court in the *United States vs. Matson Navigation Company, et al.*, 201 F. 2d 610 (9th Cir. 1953), in upholding the constitutionality of the Admiralty Jurisdiction Extension Act of 1948, adopted the reason of Justice Story that

> the Constitution grant must be liberally construed to encompass all that can be included in the ancient laws, customs, and usage of the sea, not only in England before the restrictive statutes were passed, but also in the maritime courts of all the other powers of Europe.

See DeLovio vs. Boit, 2 Gall. 398, 7 Fed. Cas. No. 3,776 (C.C. Mass. 1815), cited with approval in *Insurance Co. vs. Durham*, 78 U.S. (11 Wall.) 1 (1870).

In 1972, Congress, in its discretion, chose to exercise its paramount powers over admiralty by specifically including within a uniform compensation statute a subject which has long been recognized as inhering in the general maritime laws of other nations, shipbuilding. Indeed, we submit, this is not the first instance in which Congress has exercised its powers because of its concern for shipbuilding which is primary to our maritime commerce. In *Richardson vs. Harmon*, 222 U.S. 96, 105 (1911), the Court noted that enacting legislation[7] limiting the liability of shipowners in their interest in a ship and its freight, Congress did so for the encouragement of shipbuilding and the employment of ships in commerce. It is of further significance that this limitation of liability included both tort and contract actions whether they were subjects strictly maritime or are non-maritime.

Both the language and the legislative history of the 1927 Longshoremen's Act established beyond question that it was enacted solely in the exercise of Congress's authority to revise the general maritime law under the admiralty clause. Indeed, it was clear that the motivating force for passage of the Act was the *exclusivity* of federal authority to provide a compensation remedy for at least some employees injured on the water.[8] And, since Congress's authority to enact

7 Act of March 3, 1851, 9 Stat. 635, and as extended by §18 of the Act of June 26, 1884, 23 Stat. 57.

8 *Southern Pacific Co. vs. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. vs. Stewart*, 253 U.S. 149 (1920); *Washington vs. W. C. Dawson & Co.*, *supra.*, 264 U.S. at 227.

legislation on the pattern of the Act pursuant to the admiralty power had already been approved by the very decision[9] that finally convinced Congress that there was no way to leave such matters to the states, the occasion to consider the Act as an exercise of any other power never arose.

But if any deficiency in Congress's authority to include shipbuilding or to extend the Act ashore were found to exist under the admiralty power alone, such extension could not be denied effect unless Congress *wholly* lacked such authority. The presumption of constitutional validity which attaches to all duly enacted statutes could hardly be overcome by a showing that a constitutional grant of power relied on in 1927, which was wholly adequate to support the law passed at the time, is inadequate to support the extension of that legislation enacted forty-five years later. Rather, Congress is deemed to have exercised all the authority it possesses to accomplish the end embodied in its enactments.[10] Thus, if it were found that the admiralty clause is an insufficient basis for the inclusion of shipbuilders and the shoreside extension of the Act, the Act must nevertheless be sustained unless it is beyond the combined reach of the admiralty *and* commerce powers. The complementary character of the two powers has been familiar for well over a century. *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 76-79 (1838); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-192 (1824). The two powers are entirely distinct; either or

9 *Washington vs. W. C. Dawson & Co.*, *supra.*, 264 U.S. at 227.

10 *Cf. United States vs. Carolene Products Co.*, 304 U.S. 144 (1938); *Heart of Atlanta Motel vs. United States*, 379 U.S. 241 (1964).

both may justify legislation, and neither limits the other. *The Genesee Chief*, 53 U.S. (18 How.) 443, 452 (1851); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 577 (1875).

Before the 1972 Amendments to the Longshoremen's Act could be found to be beyond the proper scope of federal legislative authority, then, they must be measured against the whole of Congress' power derived from both sources. We submit that the authority of Congress to extend a federal compensation remedy as labor legislation under the commerce clause, is clear beyond argument. *E.g., Second Employers' Liability Cases*, 223 U.S. 1 (1912); *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States vs. Darby*, 312 U.S. 100 (1941); *cf. Katzenbach vs. McClung*, 379 U.S. 294 (1964).

We submit, therefore, that shipbuilding is a subject which inheres in the Constitutional grant of authority over admiralty and maritime affairs and that Congress has not abused its power and discretion[11] to include shipbuilders in a uniformly applicable compensation remedy.

PETITIONER'S AUTHORITY IS DISTINGUISHED

The Petitioner throughout its brief has relied heavily on the case of *Weyerhauser Co. vs. Gilmore*, 528

11 It should be noted that in exercising its power, Congress has acted in a limited fashion and that the 1972 Amendments to the Longshoremen's Act pertains only to that area of law generally deeminated as workers' compensation; Congress in enacting the Amendments has not chosen to bring within admiralty all contracts pertaining to new ship construction.

Fed. 2d 957 (9th Cir. 1975) and suggests a conflict between the *Weyerhauser case* and the *Halter Marine case* as applied to the case at bar.

The *Weyerhauser case* involved an injury to a "pondman" who was injured while working at his duties involving the sorting of logs and feeding them into a lumber mill for processing by moving about on walkways and logs which were floating on a salt water bay at the Pacific Ocean. This case is easily distinguished from the case at bar because Gilmore clearly was not engaged in "maritime employment" within the pervue of the 1972 Amendments. However, in the case at bar, Morgan clearly fits within the definition under the Act. It is undisputed that he was engaged in shipbuilding and his job description at least required him to do ship repair.

CONCLUSION

In view of the foregoing, it is submitted that Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, Bobby G. O'Barr, of counsel for Claimants-Respondents in the above styled matter, hereby certify that I have this day mailed three true copies of the foregoing Reply To Petition For Writ of Certiorari to Honorable George E. Morse, Attorney at Law, P. O. Box 100, Gulfport, MS 39501, Honorable George Williams, Jr., Attorney at Law, P. O. Box 149, Pascagoula, MS 39567, Honorable Eldon Bolton, Jr., Attorney at Law, P. O. Box 4077, Gulfport, MS 39501, and Miss Laurie Streeter, Associate Solicitor, United States Department of Labor, Room N-2716 NDOL, Washington, D.C. 20210.

This ____ day of October, 1977.

BOBBY G. O'BARR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-408

INGALLS SHIPBUILDING CORPORATION, DIVISION OF LITTON SYSTEMS, INC.,

Petitioner,

vs.

DOROTHY T. MORGAN, ERNEST T. MORGAN, JR., TIMOTHY E. MORGAN,

Claimants-Respondents,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondent.

BRIEF OF AMICUS CURIAE NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY.

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BRIEF OF AMICUS CURIAE NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY.

STATEMENT OF INTEREST OF AMICUS CURIAE.

This *Amicus Curiae* Brief is filed on behalf of the Newport News Shipbuilding and Dry Dock Company (hereinafter Newport News Shipbuilding), a division of Tenneco. Newport News Shipbuilding is the largest shipyard in the world employing 26,000 people. The Shipyard has delivered ten of the last fourteen nuclear powered ships built for the United States Navy since 1974. It is the only shipyard capable of servicing and building the full range of Navy nuclear vessels. By the end of 1977, the Shipyard will deliver to the Navy two more nuclear

submarines, one nuclear aircraft carrier and a nuclear guided missile cruiser. The Shipyard will deliver more tonnage to the Navy in 1977 than all United States shipyards did in 1975. In addition, the Shipyard is a leader in ship repair and commercial new construction. From the beginning of 1977 until September 15, 1977, three ships had been delivered, three had been launched and the keels of four more had been laid.

Newport News Shipbuilding employees are engaged in every aspect of the shipbuilding industry, including many supporting services which are not directly related to the construction of ships. It is also engaged in many activities having no connection with shipbuilding. Some of these employees, if injured, are entitled to coverage under the Longshoremen and Harbor Workers' Compensation Act (hereinafter the LHWCA), while other employees are entitled to coverage under the Virginia Workmen's Compensation law. Since the *Amicus* is self-insured, it is directly responsible for payments under both of the above acts. In 1976, Newport News Shipbuilding paid benefits in the amount of $1,008,000.00 under the LHWCA and in the amount of $585,000.00 under the state act.

Any decision by this Court as to the application of the LHWCA to shipbuilding activities will have a direct and substantial economic impact upon this *Amicus* as well as the entire shipbuilding industry throughout the United States. Because of the absence of a definitive determination by this Court of the extent of application of the LHWCA to shipbuilding, this *Amicus* has been unable to determine whether a particular injury incurred by an employee should be compensated under the LHWCA or under the state act. Consequently, this *Amicus* has incurred substantial penalties, interest charges and liability for claimants' attorneys' fees in contesting the jurisdiction of the LHWCA before Administrative Law Judges, the Benefits Review Board and the Fourth Circuit Court of Appeals.

At the present time, the *Amicus* has two cases pending before the Fourth Circuit Court of Appeals which are directly concerned with the jurisdiction of the LHWCA.

In *Willie A. Graham* v. *Newport News Shipbuilding and Dry Dock Company* (77-2297) (4th Cir.), the claimant was employed as a "chipper" in a land based "sub-shop" where he removed temporary attachments from items under construction by other employees. The claimant did not assemble any component part of a ship. The items on which the claimant worked were removed from the "sub-shop" by other employees to locations where other employees would assemble these items to construct a vessel. The claimant did not at any time perform his work duties on a vessel and in fact the sub-shop is located 1200 feet from the James River, the nearest navigable waters. The claimant sustained a back injury while performing these activities and he was awarded benefits by the Administrative Law Judge who also assessed penalties, interest charges and attorney's fees against Newport News Shipbuilding. The award was affirmed by the Benefits Review Board.

In *George E. Jones* v. *Newport News Shipbuilding and Dry Dock Company* (77-1100) (4th Cir.), the claimant was employed in a foundry as a mechanic's helper. The claimant was required to grease and oil various machines located throughout the foundry. He did not have anything to do with manufacturing any products. The foundry manufactures castings for the shipyard and for another subsidiary corporation of Tenneco, Inc. having no relation to shipbuilding. The foundry is located approximately 3,000 feet from the water's edge. The claimant was not at any time required to perform any work duties on a vessel. The claimant sustained a shoulder injury for which he received an award from the Administrative Law Judge who also assessed penalties, interest charges and attorney's fees against Newport News Shipbuilding. The Benefits Review Board affirmed the award.

The *Amicus* contends that the decision in *Graham, supra,* and *Jones, supra,* are clearly erroneous and since it is highly likely that this *Amicus* will present substantially the same issues to this Court in a Petition for Certiorari in the event of an adverse

decision entered against the *Amicus* in the *Jones* and *Graham* cases, and since a decision by this Court favorable to Ingalls Shipbuilding Corporation would be dispositive of the issues in *Jones* and *Graham*, the interests of justice and judicial economy would best be served by granting the Petition for Certiorari in this case.

The *Amicus* contends that the decision of this Court in *Northeast Marine Terminal* v. *Caputo, I. T. O.* v. *Blundo*, ... U. S. ....., 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977), did not resolve the crucial issue in the present case and in numerous cases confronting this *Amicus*, namely, the extent of the application of the LHWCA to the employees and activities of the shipbuilding industry.

The *Amicus* has obtained the written consent of all parties in interest in the present action prior to submitting its Brief.

Accordingly, Newport News Shipbuilding and Dry Dock Company prays that it be allowed to submit its Brief as Amicus Curiae for the Court's consideration of the instant Petition for Certiorari.

ARGUMENT.

The 1972 Amendments—The Coverage of Shipbuilders—The Problem of Terms Never Defined.

In 1972, the Congress enacted P. L. 92-572 amending the LHWCA. The issues before this Court and the problem confronting this *Amicus* are the threshold issues concerning jurisdiction over who are persons engaged in maritime employment and where those persons so engaged are injured.

In determining whether a particular employee who sustains an injury is within the coverage of the LHWCA it is necessary to consider two separate definitions within the Act.

The first defines the *status* which the affected employee must occupy in order to bring his injury within the coverage of the Act:

> "[t]he term 'employee' means any person engaged in maritime employment, including any Longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker. * * *"[1]

The second defines the *situs* wherein a covered employee's injury must occur:

> "[c]ompensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."[2]

The problem which exists in the foregoing language is that the term "shipbuilding" is never defined in either the LHWCA or the legislative history of the 1972 amendments.[3]

It is the position of this *Amicus* that a workable and logical definition of the term "shipbuilding" has been adopted by one federal agency and that a further refinement of that definition which would resolve all the issues in this case has been adopted by at least one federal court.

To resolve the definitional issue of "shipbuilder" by simply indicating that a shipbuilder is one who builds ships begs the question. In the abstract sense, at least, it can be said that anyone who forms a part of a ship is a shipbuilder.

The term "shipbuilding," as it is commonly understood in the industry, has a definition that is precise and applicable to this case. This definition is set forth in safety and health regulations for the shipbuilding industry promulgated by the Occupational Safety and Health Administration:

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1. 33 U. S. C. § 902(3).
2. 33 U. S. C. § 903(a).
3. 1972 U. S. Code Cong. and Adm. News 4698, *et seq.*

> The term 'shipbuilding' means the construction of a vessel, including the installation of machinery and equipment.[4]

However, if the definition of shipbuilding which has been adopted by OSHA was to be adopted by this Court as the all-inclusive definition of shipbuilding, then the litigation in this area would simply shift from what constitutes shipbuilding to what constitutes construction. Therefore, it is respectfully submitted that the definition of construction, as it relates to shipbuilding should further be refined.

The term "construction" as it relates to shipbuilding has been defined as:

> [t]he process * * * by bringing together—correlating—a number of independent entities, constructing a definite entity; and this process is construction."[5]

Simply stated, the construction of a ship is the putting together of the parts that form that ship, or as the court noted in *The Dredge A, supra,* the bringing together and correlating of a number of independent entities.

This definition is in accord with a common sense understanding of the definition of construction. Accordingly, a shipbuilder is one *who brings* together and correlates a number of independent entities so as to form a definite entity. To hold otherwise, the 1972 Amendments would serve to not only extend the shipyard area covered under the LHWCA to maritime employees as was intended, but would also result in an enlargement and extension of the definition of maritime employment which was not intended. For example, an employee working in the foundry or tool and die shop of an employer engaged in shipbuilding and who manufactures or works on a part which is ultimately incorporated into a ship is not a maritime employee. A more extreme example would be of an employee performing this same function in a plant of the same employer located amid the wheat fields of Kansas where the parts worked on are subsequently

4. 29 CFR 1916.2(i).

5. *The Dredge A,* 217 F. 617, 631-632 (E. D. N. C. 1914).

shipped to Newport News, Virginia for incorporation into a ship. In each example, it is submitted that neither the foundry worker nor tool and die maker comes within the definition of maritime employee under the LHWCA.

The job of a shipbuilder has another aspect. By definition he is an *amphibious* worker. As this Court has clearly pointed out:

> "[t]he Act (LHWCA) focuses primarily on occupations—longshoreman, harbor worker, ship repairmen, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to *these amphibious workers* who, without the amendments, would be covered only for part of their activity. (Emphasis added.)[6]

In *Jacksonville Shipyard Inc.* v. *Perdue*[7] the Court of Appeals for the Fifth Circuit held that a worker who was injured while building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned was within the coverage of the LHWCA. The court pointed out that though most of his work was performed off of the ship, a necessary and integral part of his work required him to go on board vessels to take measurements, or to install or repair some woodwork. The court went on to note that even though a fellow employee would have sometimes installed an item which the injured employee was building when he was injured, the only reasonable conclusion was that the injured employee was directly involved in an ongoing shipbuilding operation.

This reasoning is consistent with the definitions of shipbuilding and construction which have been advanced by the *Amicus.*

In accord with this view and highlighting a distinction between maritime and non-maritime workers, the Court of Appeals for

6. *Northeast Marine Terminal Co.* v. *Caputo, ITO* v. *Blundo,* ..... U. S. ....., 97 S. Ct. 2348, 2362, 53 L. ed. 2d 320, 338 (1977).

7. *Jacksonville Shipyard Inc.* v. *Perdue,* 539 F. 2d 533 (5th Cir. 1976), *cert. denied, sub. nom., Halter Marine Fabricators, Inc.* v. *Nulty,* 45 U. S. L. W. 3838 (U. S. June 27, 1977).

the Ninth Circuit, in denying coverage under the LHWCA to a sawmill worker, stated:

> "[w]e find it illogical to think of a pondman's work and duties at or on an upland sawmill's log pond as 'maritime employment' in the traditional sense. Neither do we believe that a bayside location or situs of a sawmill with its partitioned salt water log pond in any fashion changes the universal and customary nature of the pondman's work and *ipso facto* engages him in 'maritime employment.' "[8]

CONCLUSION.

The *Amicus* submits that the reasoning of the Ninth Circuit Court of Appeals in *Weyerhauser Company* v. *Gilmore*,[9] should guide this Court in determining these crucial issues. As that Court stated:

> "[i]n expanding the maritime situs element of the Act, however, *Congress clearly did not intend to broaden the class of covered employees to include anyone injured in an adjoining area.*" (Emphasis added.)[9]
>
> "We join the observation of the Law Judge that the intent of Congress in extending the Act was not to 'open the doors' to all employees, but to minimize the adverse effect of a shoreside location or situs when a *maritime* employee is injured."[10]

Implicit in the court's statement is that the 1972 amendments were designed *to extend the act only to maritime employees engaged in maritime work while ashore.*

The Ingalls Shipbuilding Corporation and Newport News Shipbuilding and Dry Dock Company as *Amicus* submit that the Office of Worker's Compensation Programs and Administrative Law Judges of the Department of Labor have consist-

8. *Weyerhauser Company* v. *Gilmore*, 528 F. 2d 957, 961-62 (9th Cir. 1975), *cert. denied*, ... U. S. ....., 97 S. Ct. 179 (1976).

9. *Id.* at 960.

10. *Id.* at 961.

ently ruled that non-maritime employees not engaged in shipbuilding who are injured ashore are covered under the LHWCA. This position is inconsistent with the intent of Congress when it adopted the 1972 amendments.

Wherefore, Newport News Shipbuilding respectfully requests this Court to grant *certiorari* to the Ingalls Shipbuilding Corporation and to allow Newport News Shipbuilding to participate in this matter as *Amicus Curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-408

INGALLS SHIPBUILDING CORPORATION,
DIVISION OF LITTON SYSTEMS, INC.,
Petitioner,

versus

DOROTHY T. MORGAN, ERNEST T. MORGAN, JR.,
TIMOTHY E. MORGAN,
Claimants-Respondents,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS,
Respondent.

BRIEF OF AMICUS CURIAE SHIPBUILDERS COUNCIL OF AMERICA

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Respondent.

AMICUS CURIAE BRIEF OF THE SHIPBUILDERS COUNCIL OF AMERICA

The Shipbuilders Council of America, as *Amicus Curiae*, urges that Petitioner's prayer be granted and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a decision of the Benefits Review Board, U. S. Department of Labor, in Respondent's favor.

STATEMENT OF INTEREST OF AMICUS CURIAE

This *Amicus Curiae* Brief is filed on behalf of Shipbuilders Council of America, an industry association of the major shipbuilders, ship repairers, and component suppliers in the United States. Sixteen shipyards comprise its membership along with four major shipyard association members and fifteen allied industry members. Preliminary 1976 data made available by the U. S. Bureau of Labor Statistics showed that the total employment of shipyards reached a high of 169,900 in October. The majority of employees working in private shipyards are employed by members of the Shipbuilders Council of America.

The shipbuilding industry has been adversely impacted by the unresolved jurisdiction and coverage disputes. Immeasurable expense and penalties have been occasioned as a direct consequence of the uncertainty of the 1972 coverage and jurisdiction amendments to the Longshoremen and Harbor Workers' Compensation Act (hereinafter referred to as LHWCA).

The Supreme Court has not reviewed any jurisdictional case concerning the shipyard worker. This Court's decision in *Northeast Marine Terminals v. Caputo, I.T.O. v. Blundo*[1], did not establish a test dispositive of the jurisdictional issues for shipyard workers. The instant case represents only one of hundreds, if not thousands, of cases concerning employees of shipyards wherein the jurisdictional

1 *Northeast Marine Terminals v. Caputo, I.T.O. v. Blundo,* ___ U.S. ___, 97 S.Ct. 2348 (1977).

and coverage issue is existent. If the LHWCA is to apply within a constitutional framework, a workable test must be fashioned to allow a precise determination of which shipyard workers are covered by the LHWCA. *Amicus* believes its experience and knowledge of shipyards and its awareness of the problems facing the industry can materially assist the Supreme Court in forging a workable test for the determination of jurisdiction and coverage.

Amicus submits the final determination of the jurisdictional and coverage issue will significantly reduce litigation.

The *Amicus* has obtained the written consent of all parties in interest in the present action prior to submitting its Brief.

The Shipbuilders Council of America prays that it be allowed to submit its Brief as *Amicus Curiae* and that this Court grant *certiorari* to Ingalls Shipbuilding Corporation.

ARGUMENT

The threshold question presented herein is whether Congress, by enacting the 1972 amendments to the LHWCA, intended to provide benefits under that Act as a result of Morgan's death. The intent of Congress is best determined by statutory construction of the amendment, together with its legislative history. Accordingly, the importance of prior jurisprudence cannot be diminished.

The historical development of the Longshoremen and Harbor Workers' Compensation Act has been often and fully discussed and need not be repeated in detail. The keel was laid with the decision of *Southern Pacific Company v. Jensen*,[2] which held that the individual states had exceeded their authority in attempting to provide state compensation benefits to a longshoreman injured aboard navigable waters. However, shore-side injuries to longshoremen were compensable under state statutes.[3]

Congressional attempts to allow states to provide compensation remedies to injuries occurring aboard navigable waters were held to constitute an unlawful delegation of Congressional power.[4] These decisions led Congress, in 1927, to enact the LHWCA to fill the void and provide a federal compensation remedy for injuries occurring on navigable waters where recovery could not validly be provided through a state compensation statute.[5] While the latter phrase brought on the sometimes confusing concept of the "twilight zone",[6] the waters edge — often referred to as the *Jensen* Line — was held to be the dividing line between state and federal coverage. The twilight zone concept removed some of the inequities for longshoremen or ship repairmen.[7]

2 *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917).

3 *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933 (1922).

4 *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920).

5 44 Stat. 1424, 33 U.S.C.A. § 901-950 (1927).

6 Gilmore & Black, *The Law of Admiralty*, § 6-49 (2d Ed. 1975).

7 *Swanson v. Mirra Bros., Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946); *Davis v. Department of Labor and Industries*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942); *Parker v. Motorboat Sales*, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184 (1941).

Shipbuilders engaged in new construction of vessels were not covered by the LHWCA until this Court's decision of *Calbeck v. Travelers Ins. Co.*[8] The intent of Congress was viewed "to exercise its full jurisdiction seaward of the *Jensen* Line and to cover all injuries on navigable waters, whether or not state compensation was also available in particular situations."[9] In *Nacirema Operating Co. v. Johnson*,[10] the Court again interpreted the Longshoremen and Harbor Workers' Compensation Act as not providing coverage to longshoremen on the shoreward side of the *Jensen* Line even though injured while loading or unloading a vessel.

In concluding the opinion of the majority in *Nacirema*, Justice White wrote:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not affect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the act. In construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction — whatever they may be and however they may change — simply replaces one line with another whose uncertain contours could only perpetuate on the landward side of the *Jensen Line*, the same confusion that previously

8 *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962).

9 *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 221-222, 90 S.Ct. 347, 353, 24 L.Ed.2d 371, 377 (1969).

10 *Id.*

existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court."[11]

The invitation extended to Congress to expand coverage of the Act shoreward was not the primary motivating force behind the 1972 amendments. The more significant considerations then appeared to be the elimination of the Sieracki-Ryan[12] doctrine which allowed injured workers to circumvent the longshoremen's act through tort actions against vessels which would almost always recover over against the employer.

Less notoriety was given to the attempt of Congress to correct the disparity in benefits payable to longshoremen and harbor workers injured on the Calbeck side of the *Jensen* Line from the benefits available to the very same longshoremen and harbor workers injured on the *Nacirema* side of the *Jensen* Line while performing virtually the same work. To alleviate this situation, Congress amended the coverage section as follows:

11 *Id.*, 396 U.S. at 224, 90 S.Ct. at 354.

12 *Seas Shipping Co. v. Sieracki*, 328 U.S. 25, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). As respects shipbuilders and ship repairmen seek contrary decisions. *Gay v. Ocean Transport and Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Smith v. M/V CAPT. FRED*, 546 F.2d 119 (5th Cir. 1977); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1977) *cert. den.*, 423 U.S. 1054.

"Compensation shall be payable under this Act in respect of disability or death of any employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . .[13]

Congress also redefined the term "employee" to include

". . . any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."[14]

Reference to the legislative history concerning the landward extension of coverage clearly indicates that by the above quoted amending language, Congress only meant to resolve the *Calbeck-Nacirema-Jensen* problem. Congress did not intend to extend coverage to workers who would not have been in a *Calbeck* situation — on navigable waters for at least a portion of their work activity. House Report No. 92-1441 contains the following pertinent language with respect to the extension of coverage to shoreside areas:

13 33 U.S.C.A. § 903(a) as amended (1972).

14 33 U.S.C.A. § 902(3) as amended (1972).

"Present act, insofar as longshoremen and shipbuilders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

* * *

It is apparent that if the Federal benefit structure embodied in the Committee bill is inactive, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a shiprepairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, ship breakers,

or other employees engaged in *maritime employment* (excluding masters and members of the crew of a vessel) if the injury occurred *either* upon the navigable waters of the United States or any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity . . . The Committee *does not intend* to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo."[15]

Accordingly, Morgan, the decedent in the instant case, would not be covered under the Longshoremen and Harbor Workers' Compensation Act as amended in 1972 since it is clear that none of his duties ever brought him over the navigable waters of the United States and he would not have been covered by the pre-1972 Act for any part of his work activity. The

15 3 U.S. Code Congressional and Administrative News, pp. 4707 through 4808 (1972) (emphasis added).

decedent's total lack of connexity with the navigable waters of the United States denies him the status of one engaged in "maritime employment" as the legislative history and case law dictate that term to be construed. It is the amphibious nature of the work of the longshoreman or harbor worker which now affords him coverage under the act, regardless of whether he is injured over navigable waters or on any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, etc.

The new definition of the covered "employee" does away with decisions such as *Pennsylvania Railroad Co. v. O'Rourke,*[16] where under the pre-1972 Act focus was not on the individual employee, but on whether the employer had other employees engaged in maritime employment. In earlier cases, the term "maritime employment" was construed as work activity on navigable waters.[17] The issue before the Fifth Circuit in *Nalco Chemical Corp. v. Shea,*[18] was whether Nalco fell within the definition of employer under Section 902(4) of the Act. The Fifth Circuit focused on the activities of the deceased employee in order to determine whether his employer fell within the definition of Section 902(4). After noting that the Act is to be liberally construed in favor of the injured employees, the Court went on to state:

16 *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367 (1953).

17 *Pennsylvania Railroad Co. v. O'Rourke, Id.; Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 50 S.Ct. 303, 74 L.Ed. 754 (1930); *Parker v. Motorboat Sales, supra; Nalco Chemical Corp. v. Shea*, 419 F.2d 522 (5th Cir. 1969).

18 *Nalco, supra.*

> "We conclude that Quave's activities were sufficiently maritime to fall within the scope of 33 U.S.C. § 902(4). It is noted that this section of the Act covers all employers whose employees are engaged in maritime employment 'in whole or in part'. This becomes significant here for Quave's activities were often over water and it was over water that the fatal accident took place. His regular duties consisted in large part of traveling directly to offshore drilling platforms which he could only reach by boat or sea plane."[19]

In applying the amended act to a longshoreman injured on a pier, this Court, in *Northeast Marine Terminal Co. v. Caputo,* noted that though Congress extended the area of coverage, it did not extend the status of employees so covered. Mr. Justice Marshal noted:

> "The Act focuses primarily on occupations — longshoreman, harbor worker, ship repairman, ship builder, ship breaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these *amphibious workers* who, without the amendments, would be covered for only part of their activity. It seems clear, therefore, that when Congress said it wanted to cover 'longshoremen' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and

19 *Id.*, 419 F.2d at 574 (citation omitted).

> who, without the amendments, would be covered only for part of their activity."[20]

Amicus submits that since the decedent herein did not occupy the status of an employee covered for any part of his activity prior to the amendments, the amendments, which only expand the situs aspect of coverage, would not now make the decedent a covered employee under the Act.

Nevertheless, certain appellate courts have ignored both the earlier case law and the legislative history leading up to the enactment of the 1972 amendments and have extended coverage under the Act to all shipyard workers who are involved in an ongoing shipbuilding operation,[21] or who have a functional relationship to shipbuilding operations.[22] The statutory construction adopted by the Fifth and Third Circuits raises serious questions as to the constitutionality of the LHWCA, and it is respectfully submitted that their unnecessary interpretation of the LHWCA renders it unconstitutional.

Acknowledging that the constitution confers upon the United States Courts all cases of admiralty and maritime jurisdiction, does Congress have the authority to expand the admiralty and maritime jurisdiction to include a federal compensation remedy to a shore-based worker for a shore-based injury simply

20 *Northeast Marine Terminal Co. v. Caputo, supra*, 97 S.Ct. 2362 (emphasis added).

21 *Ingalls Shipbuilding Corp. v. Morgan*, 551 F.2d 61 (5th Cir. 1977); *Halter Marine Fabricators, Inc. v. Nolty*, decided with *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976).

22 *Dravo Corp. v. Maxin*, 545 F.2d 374 (3rd Cir. 1976) and *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation*, 540 F.2d 629 (3rd Cir. 1976).

because of his employment as a shipyard worker? This Court has previously recognized the power of Congress to expand admiralty and maritime jurisdiction though cautioning that the said power is not limitless. In *Detroit Trust Co. v. The Thomas Barlum*,[23] this Court held:

> "The Congress [rests] its authority upon the constitutional provisions extending the judicial power 'to all cases of admiralty and maritime jurisdiction' and conferring upon the Congress the power to make all laws which shall be 'necessary and proper' for carrying into execution all power 'vested by this Constitution in the government of the United States, or in any department or officer thereof.' Art. III, § 2; Art. I, § 8, par. 18 . . . But the grant pre-supposed a 'general system of maritime law' which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation. *The Lottawanna*, 1 Wall, 558, 574, 575 [22 L.Ed. 645]. The constitution did not undertake to define the precise limits of that body of law or to lay down a criterion for drawing the boundary between maritime law and local law. *Id.* Boundaries were to be determined in the exercise of judicial power in recognition of the purpose of the grant. 'No state law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine its true limits.' *The St. Lawrence*, 1 Black 522, 527 [17 L.Ed. 180]. The framers of the constitution did not con-

23 *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 55 S.Ct. 31, 79 L.Ed. 176 (1934).

> template that the maritime law should remain unalterable . . . The Congress thus has paramount power to determine the maritime law which shall prevail throughout the country . . . But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of admiralty and maritime jurisdiction . . ."[24]

Though earlier court decisions are not conclusive as to the constitutional authority of Congress to expand the maritime law, such cases are indicative of the boundaries within which Congress may act. Just one year prior to the amendments in question, this Court had the opportunity to determine whether state law or federal maritime law governed the suit of a longshoreman injured on a pier by allegedly defective shore-based equipment.[25] Noting that the traditional concept of maritime tort jurisdiction reached only those torts occurring on navigable waters, the Court stated:

> "In the present case, however, the typical elements of a maritime cause of action are particularly attenuated: respondent Law was not injured by equipment that was part of the ship's usual gear or that was stored on board, the equipment that injured him was in no way attached to the ship, the forklift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gang plank. Affirmants of the decision below would raise a host of new problems as to the standards for and limitations on the applicability of

24 *Detroit Trust Co. v. The Thomas Barlum, supra*, 293 U.S. at 42-44, 55 S.Ct. at 38. (citations and footnotes omitted).

25 *Victory Carriers v. Law*, 404 U.S. 200, 9 S.Ct. 418, 30 L.Ed.2d 383 (1971).

> maritime law to accidents on land. At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law.[26]

Thus, extension of jurisdiction herein should conform to congressional intent to cover amphibious shipyard workers injured over land.[27] Justice White's earlier comments on the rights of the respective state governments to provide state compensation benefits in traditional areas of state law are appropriate to the question at hand:

> "We are not inclined at this juncture to disturb the existing precedents and to extend shoreward the reach of the maritime law further than Congress has approved. We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish opportunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts. As the Court declared in *Healy v. Ratta*, 292

26 *Victory Carriers v. Law, supra*, 404 U.S. at 214, 92 S.Ct. at 426 (footnote omitted).

27 See discussion at footnote 15, *supra*.

> U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934), 'the power reserved to the states under the constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the construction * * *. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.' "[28]

The current test for maritime tort jurisdiction not only requires the locality of the accident on navigable waters but also requires that the event giving rise thereto have a sufficient relationship to traditional maritime activity.[29] Accidents occurring on land or extensions thereof including piers and wharves adjacent to the navigable waters have been considered outside of the sphere of admiralty and maritime jurisdiction.[30]

Our statutory exception to the general rule exists by way of the Admiralty Extension Act,[31] in which Congress brought within the admiralty and maritime jurisdiction of the federal courts claims for damage or injury done or consummated on land by a vessel on

28 *Victory Carriers v. Law, supra*, 404 U.S. at 212, 92 S.Ct. at 425.

29 *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

30 *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969); *Victory Carriers, Inc. v. Law, supra*; *Hastings v. Mann*, 340 F.2d 910 (4th Cir. 1964); *Peytavin v. Government Employees Insurance Company*, 453 F.2d 1121 (5th Cir. 1972).

31 46 U.S.C.A. Section 740 (1948).

navigable waters. In upholding the constitutionality of the Admiralty Extension Act, the 9th Circuit Court of Appeals observed:

> "While the *exercise* of admiralty jurisdiction by the United States courts did not extend to injuries caused by ships to land structures prior to the passage of the Admiralty Extension Act in 1948, we are of the opinion that such accidents are both reasonably and historically within the concept of maritime affairs, The Barlum, 293 U.S. 21, 45, 55 S.Ct. 31, 79 L.Ed. 176, and were, therefore, within the admiralty and maritime jurisdiction, as known and understood in the United States when the constitution was adopted."[32]

The very language of the Admiralty Extension Act demonstrates that the shoreside damage or injury must have a direct connection with the navigable waters, the basis for inclusion of such claims in the admiralty and maritime jurisdiction.

Another example of shore-side injuries cognizable in admiralty involve a seaman's right to maintenance and cure when injury on shore so long as the seaman was "in the service of the shop."[33] A seaman by definition is one:

> "Assigned permanently to a vessel (including special purpose structures not usually

32 *United States v. Matson Navigation Co.*, 201 F.2d 610 (9th Cir. 1953), p. 615.

33 *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107 (1943).

> employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessels; and . . . the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in times of its maintenance during its movement or during anchorage for its future trips."[34]

The duties of a seaman and his relationship to navigable waters provide the basis for the exercise of admiralty and maritime jurisdiction over his shoreside injuries sustained while in the service of the ship. As can be readily discerned, Congress may validly extend the admiralty and maritime jurisdiction to cover shoreside accidents or injuries provided that there exists a direct, physical contact with navigable waters — the historic and traditional basis for maritime and admiralty jurisdiction. The Act as construed by the 9th and 5th Circuits[35] providing coverage to shipyard workers who have no direct, physical contact with navigable waters constitutes an unwarranted extension which renders the 1972 amendments unconstitutional. Obviously, since Congress felt constrained by "navigable waters" criteria, it was not the intent of Congress to extend jurisdiction to non-amphibious workers and thereby create a challenge to the Act's constitutionality.

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34 *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

35 See discussion at footnotes 21 and 22, *supra*.

CONCLUSION

Prior to the 1972 Amendments to the LHWCA a shipyard worker was covered only when injured seaward of the *Jensen* Line. The 1972 amendments serve to extend the *Jensen* Line shoreward. The avowed purpose for extending the *Jensen* Line shoreward was to prevent an inequity occurring to an amphibious worker who might be injured shoreward of the *Jensen* Line. Hence, subsequent to the 1972 amendments, shipyard workers who are engaged, at least in part, in work activities seaward of the *Jensen* Line will be covered under the provisions of the LHWCA for injuries occurring on land. If jurisdiction under LHWCA is extended to shore-side workers for shore-side injuries, an unnecessary interpretation of the LHWCA would render the 1972 amendments unconstitutional and would promote a continuing states versus federal conflict. Establishing the line of demarcation between amphibious and non-amphibious workers confines federal jurisdiction to the precise limits the statute and history of its enactment have defined.

The *Amicus* submits that the reasoning of the Ninth Circuit Court of Appeals in *Weyerhauser Company v. Gilmore*,[36] should guide this Court in determining these crucial issues. As that Court states:

> "[i]n expanding the maritime situs element of the Act, however, *Congress clearly did not intend to broaden the class of covered employees to include anyone injured in an adjoining area.*"[37] **(Emphasis added)**

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36 *Weyerhauser Co. v. Gilmore*, 528 F.2d 957, 961-62 (9th Cir. 1975), *cert. denied* ___ U.S. ___, 97 S.Ct. 179 (1976).

37 *Id.* at 960.

> "We join the observation of the Law Judge that the intent of Congress in extending the Act was not to 'open the doors' to all employees, but to minimize the adverse effect of a shoreside location or situs when a maritime employee is injured."[38]

The 1972 amendments to the Act were designed to extend the situs requirement to injuries occurring on land for amphibious workers engaged in maritime employment at time of injury.

The *Amicus*, Shipbuilders Council of America, respectfully requests this Honorable Court to grant certiorari to the Ingalls Shipbuilding Corporation and to allow Shipbuilders Council of America to participate in this matter as *Amicus Curiae*.

Respectfully submitted,

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38 *Id.* at 961.